

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CINDY LEE SCALA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 99-030-SLR
)	
STATE OF DELAWARE DEPARTMENT)	
OF CORRECTION,)	
)	
Defendant.)	

Herbert G. Feuerhake, Esquire, Wilmington, Delaware. Counsel for plaintiff.

Michael F. Foster, Deputy Attorney General, State of Delaware Department of Justice, Wilmington, Delaware. Counsel for defendant.

MEMORANDUM OPINION

Dated: May 22, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Cindy Lee Scala, a forty-four year old former probation officer, brought this action on January 25, 1999 against the State of Delaware Department of Correction ("DOC"). The complaint sets forth four counts including a federal discrimination claim on the basis of sex and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., a state discrimination claim on the basis of sex under 19 Del. C. § 711, and a breach of covenant of good faith and fair dealing claim. The court has jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. The court has supplemental jurisdiction over plaintiff's state claims pursuant to 28 U.S.C. § 1367. Currently before the court is defendant's motion for summary judgment on all counts of the complaint. (D.I. 35) For the reasons that follow, the court shall grant in part and deny in part defendant's motion for summary judgment.

II. BACKGROUND

The DOC hired plaintiff as a probation and parole officer on June 1, 1994, and she continued to work for the DOC until August 14, 1998. During that period, plaintiff filed two complaints with the Equal Employment Opportunity Commission ("EEOC") - the first on January 23, 1997, and the second on November 24, 1997. On October 30, 1998, the EEOC issued plaintiff a right to sue

letter. (D.I. 1, Ex. A)

Plaintiff contends, among other things, that (1) the DOC paid her a starting salary below that provided to male employees in similar positions; (2) co-workers subjected her to sexually suggestive comments; (3) DOC supervisors downgraded her responses to training exercises while male co-workers were adjudged in a disparately more lenient fashion; (4) the DOC demoted her for retaliation; and (5) the DOC constructively discharged her. (D.I. 1, ¶ 8-9, 12, 15, 17, 20) In order to assess plaintiff's claims, a review of the facts is necessary.

A. Starting Salary and First Year at the DOC

The DOC hired plaintiff on June 1, 1994 as a Probation & Parole Officer I with a starting salary of \$20,025. (D.I. 42 at B-239) Prior to joining the DOC, plaintiff had worked as a probation officer in New Jersey for eleven years. (D.I. 43 at B-506) The DOC hired 241 probation and parole officers between 1992 and 1999. (D.I. 37 at A-9) During that time, six new officers received an advanced starting salary. (D.I. 42 at B-24-41) According to the DOC, those officers received higher starting salaries because they either transferred from another State job with a higher salary, earned an advanced degree, or had several years of experience. (D.I. 36 at 2) For example, two of the six transferred from other State jobs. Another three were retired police officers with over twenty years experience. The

one female who received an advanced salary had her M.S. in criminal justice and was a Ph.D. candidate in criminology. (D.I. 37 at A-20-21; D.I. 42 at B-240-41) Although plaintiff asked about an advanced starting salary at her interview with the DOC, she never made a request in writing. (D.I. 43 at B-506; D.I. 37 at A-25)

Plaintiff spent her first year with the DOC in its Wilmington Office. Eleven months after plaintiff was hired, her first supervisor, Francis E. Farren, wrote a review of plaintiff's performance and recommended that plaintiff be promoted to Probation & Parole Officer II, noting that "[w]hen combining her tenure in New Jersey and Delaware [plaintiff] is actually one of our more experienced officers." (D.I. 43 at B-341) The review noted further that

[Plaintiff] has also voiced concerns over how certain procedures (e.g., the dress code) appear to be selectively applied to some officers but not to others. This is a common perception among officers that is not entirely without merit; however, when a supervisor offers an explanation why procedures are being enforced a certain way (e.g., in exceptional situations), it would be beneficial for [plaintiff] to learn to accept the opinion of her supervisor without being confrontational . . . even though she may not necessarily agree with it.

(D.I. 43 at B-339) Farren reported that plaintiff had been offended by an incident which involved co-workers taping condoms to the desk of a female officer with a statement saying "if you don't want to end up like her, wear these." (D.I. 43 at B-437)

Farren wrote that plaintiff's allegations were "partially true." Farren reported that plaintiff had withdrawn from group-operations and notes that such a response "is not necessarily unreasonable considering the poor interpersonal relations between [plaintiff] and other Level 1 staff in recent months." (D.I. 43 at B-340) Farren went on to blame "**almost all Level 1 personnel**, not just [plaintiff] . . . for these poor interpersonal relations." (Id.)

B. Plaintiff's Transfer to the Dover DOC

Despite Farren's recommendation, plaintiff was not promoted. Prior to finding out that she would not be promoted, plaintiff requested a transfer to the DOC's Dover Office in June 1995, where she was given a level II caseload. (D.I. 43 at B-507) While at the Dover Office, plaintiff complained about several different incidents.

1. Henry Wester

Henry Wester was an intern in the Dover Office. Plaintiff complained that in August 1995, Wester made sexually suggestive comments to plaintiff. (D.I. 1, ¶ 9) The DOC admits that Wester referred to plaintiff as "hon" or similar terms. (D.I. 4, ¶ 9) Plaintiff complained about the remarks and Wester was thereafter relocated from the Dover Office. At that point, plaintiff was satisfied with how the Wester situation had been handled. Subsequently, however, Wester returned to the Dover Office.

Although plaintiff admits having no further problems with Wester (D.I. 37 at A-33), she felt that the DOC should not have allowed him to return and that she "was on eggshells" in his presence. (Id.)

2. Tom Mosley

Tom Mosley was a probation officer in the Dover Office. Plaintiff alleges that on February 14, 1996, she received roses from a friend. Mosley asked plaintiff, "What did you have to do for them?" When plaintiff walked into a nearby office, Mosley came in, lowered his pants to hip level, and rubbed his genital area saying, "How would you like a piece of this meat?" Mosley then left the room laughing. (D.I. 1, ¶ 12) Plaintiff claims that she did not report the incident at the time of its occurrence because of her lack of faith in management. On November 8, 1996, plaintiff revealed the allegation during an Internal Affairs investigation of sexual discrimination claims raised by her co-workers. (D.I. 1, ¶ 13)

Plaintiff claims that Mosley became aware that she had told Internal Affairs about the incident. She alleges that Mosley subsequently gave her angry glares or walked quickly toward her before veering off at the last moment. (D.I. 42 at B-210) Plaintiff eventually spoke about the Mosley incident with her supervisor, Annette Franze. (D.I. 43 at B-508) At her deposition, Franze testified that she had been willing to talk to

Mosley about the incident and advised plaintiff that she could file a complaint if she wished. Plaintiff declined to file a report. (D.I. 37 at A-41-47)

3. Tack House Training

Plaintiff's complaint alleges that in December 1996, she participated in "Tack House" training for probation officers, during which her responses to staged training exercises were harshly and unfairly downgraded while those of other male trainees were adjudged in a disparately more lenient fashion. (D.I. 1, ¶ 15) At her deposition, plaintiff testified that at the training, all but two trainees were male. At the end of the session, the male trainees were dismissed while plaintiff and the other female officer were held back. The trainers told both females that they needed to be more aggressive and recommended that they receive further training. Although plaintiff admits that she was not as aggressive as the trainers wanted her to be, she felt that the males also made mistakes but were not critiqued. Plaintiff explained to the trainers that at her previous job in New Jersey, the relationship between probationers and officers was more social service oriented and the officers did not carry weapons. (D.I. 37 at A-66-71)

4. First EEOC Filing

On January 23, 1997, plaintiff filed her first charge of gender-based discrimination with the EEOC. That charge included

detailed descriptions of the Wester incident, the Mosley incident, the Tack House incident, and an incident with a DOC supervisor named Bob Hume. According to the charge, Hume had asked plaintiff why she could not schedule a late night office visit with a probationer. Plaintiff responded that she had a prayer group to attend. Hume suggested that plaintiff do it sometime other than during the prayer group, but plaintiff said she had other things to do at home that night. Hume allegedly responded, "Cindy . . . Cindy . . . Cindy, do all you women think that all there is to do is dishes and laundry." (D.I. 42 at B-215-34)¹

5. Time Sheets

Plaintiff's complaint alleges that after she filed the EEOC charge, she was subjected to hostile behavior in the workplace. Among the examples of hostile behavior toward her, plaintiff alleges that she "receiv[ed] excessive and unnecessarily negative scrutiny from supervisor Annette Franze (for example, on such matters as time sheet recordkeeping [sic]), while at the same time failing to receive necessary assistance from supervisor

¹The EEOC complaint lists five female co-workers as "similarly-situated individuals," including fellow probation officers Theresa Block and Gina Bloom and supervisor Annette Franze. (D.I. 42 at B-220) Theresa Block described the DOC in a deposition as a "boys club atmosphere" and a "mens club group." She further testified that "males were running the building" and "if you were a female, you had the feeling that you were beneath them." She specifically named Bob Hume as one responsible for projecting that atmosphere. (D.I. 42 at B-33-34)

Franze on other matters (for example, in the area of complying with field-visit requirements)." (D.I. 1, ¶ 17(g))

Plaintiff alleges that one week after she filed her first complaint with the EEOC, Franze lost plaintiff's time sheet. Franze claims that plaintiff didn't turn one in, and she filled one out for plaintiff. (D.I. 37 at A-107) Plaintiff reported to Regional Manager William Brandon that she was concerned that her time sheets were being misplaced. Brandon authorized plaintiff to have her time sheets approved by other supervisors. Brandon has testified that he told plaintiff that she should take the time sheets to other supervisors when Franze was not available. (D.I. 37 at A-110) Plaintiff thereafter had her time sheets initialed by supervisors other than Franze. Franze was not under the same impression as plaintiff and ordered plaintiff to provide future time sheets directly to her. (D.I. 37 at A-109) Plaintiff refused, saying that Brandon ordered her to have other supervisors initial the time sheets. At his deposition, Brandon took responsibility for any confusion on plaintiff's part and said that plaintiff was not admonished for any acts over the time sheets. (D.I. 42 at B-51)

6. Jamie Minner

In April 1997, plaintiff suffered a herniated disc which caused her to miss some work and go to doctor visits during long lunch breaks. Franze had allegedly asked two of plaintiff's

fellow probation officers, Gina Bloom and Jamie Minner, how plaintiff was feeling. Plaintiff filed an incident report against Franze stating:

My concern here is why Supervisor Franze is going to other employees asking why I am not coming to work when I had already reported the reasons for my absenteeism or extended lunch breaks in the past two weeks. Supervisor Franze has been known in the past to bring my business to the attention of other employees who aren't in my direct chain of command. I find this offensive, gossipy, inappropriate, and questionable as to her motive why she is doing this. This may be the cause of the above named officers unnecessary concerns.

(D.I. 43 at B-363) As to Jamie Minner, plaintiff specifically alleged that

[f]or the past week P.O. Jamie Minner has been directing constant questions to me regarding how I felt. Every time I passed Officer Minner in the hall he would make comments such as "smile," "it's not that bad," and the most offensive comments were made in front of one of his clients. Officer Minner would not stop even when I asked him to stop. I finally went into my office, and he in his own. On 04/07/97 Officer Minner went to the extent of saying that he is "an impartial person if I needed to talk," and at the same time signaling down the hall eluding to Supervisor Franze. First thing on 04/09/97 while passing in the hall Officer Minner stated, "smile." After taking my client out to the Lobby I went back to Officer Minner's office, and had to tell him to stop this constant questioning of how I felt or analyze my feelings and consequently make assessments.

(D.I. 43 at B-362)

Minner wrote a memo to Franze about his conversations with plaintiff. Minner alleges that plaintiff told him his comments were "borderline harassment." (D.I. 37 at A-45) He reported the incident to Franze "so [he] would have a personal record of the

situation in the event things escalate. . . ." Minner said that he considered plaintiff "to be a friend, not just a co-worker" and that he now "must choose each word carefully when in her presence." (Id.)

7. April 1997 Stress Leave

Plaintiff took a full-time leave of absence due to stress from April 17, 1997 to May 5, 1997. On May 5, 1997, she returned on a half-time basis until May 19, 1997, and then worked full-time thereafter. (D.I. 43, ¶ 15)

8. Art Gauani

In August 1997, plaintiff filed an incident report against a senior probation officer, Art Gauani, for what plaintiff describes as "petty acts." (D.I. 46 at 29) According to the report, plaintiff and Gauani left the office for a day to cover the return of a capias on an offender. Plaintiff alleged that

[o]n our way to [Family Court Kent County], Officer Gauani repeatedly critique[d] my driving skills. For example, Officer Gauani stated that I failed to use my blinker lights and didn't come to a complete stop at a stop sign. I have been driving since 1973 and to my knowledge Officer Gauani is not and has never been a Certified Driving Instructor by the State of Delaware. For this reason I question Officer Gauani's interpretation. However, due to the fact that Officer Gauani is a relatively new Senior Officer in our unit, I did respect his opinion even though I do not agree with it.

(D.I. 42 at B-258) According to plaintiff's incident report, Gauani and plaintiff took the offender into custody. Plaintiff attempted to handcuff the offender but failed because her

handcuffs were double locked. Gauani took over and cuffed the offender. (Id.)

Gauani later brought the handcuffing incident to plaintiff's attention, and she "readily admitted [her] error." (Id.) Gauani asked plaintiff about an arrest and search incident that had occurred a year earlier, criticizing her performance. He also questioned plaintiff as to why she lacked confidence in her co-workers, why she isolated herself from fellow staff members, and whether she may have misperceived the facts of the Tom Mosley incident. (Id. at B-258-59)

Plaintiff was bothered by the comments about the year-old arrest because at the time of the incident, Gauani had recommended that the officers involved receive a commendation from the regional manager. Plaintiff described the questions concerning Tom Mosley as being "inappropriate and quite offensive." (Id. at B-259) Plaintiff concluded the incident report by complaining that

Officer Gauani's concerns should have been submitted in a more timely fashion to my Supervisor. I believe that I have proven to be the type of Officer that respects constructive criticism from my superiors so that I may work on inadequate areas. However, I can not understand why I was praised by Officer Gauani for an arrest/search incident that occurred over a year ago, and now has become a questionable incident. Hopefully, Officer Gauani and myself can work through this in an amicable manner.

(Id. at B-260)

Gauani also filed an incident report regarding the same

incident. Gauani complained in the report that plaintiff (1) drove unsafely, (2) failed to bring the proper equipment to an arrest, and (3) did not exercise appropriate safety procedures when handcuffing an offender. Gauani detailed his conversation with plaintiff concerning her inability to handcuff the offender and the arrest from a year ago. Gauani's report indicates that he brought up the earlier arrest as an example of a time when other officers were not comfortable with plaintiff's demeanor. According to Gauani's report, plaintiff, in an outburst of profanity, complained to him about how she had been "blackballed" and harassed by various people including Mosley, Minner, and Franze. (D.I. 37 at A-132-43)

9. August 1997 Stress Leave

Plaintiff took a leave of absence due to stress from August 20, 1997 until September 2, 1997. In an affidavit, plaintiff claims the stress resulted from her "ongoing difficulties with Annette Franze and ongoing menacing behavior from Tom Mosley." (D.I. 43, ¶ 15)

10. Gina Bloom

In another example of alleged hostile behavior toward her, plaintiff claims that she was ordered to prepare multiple incident reports regarding an incident with a fellow probation officer, Gina Bloom, even though the dispute had been amicably resolved between the two of them.

On September 24, 1997, Bloom and plaintiff had a disagreement regarding the possible arrest of an offender. The two argued and when Bloom turned her back to leave the room, plaintiff gave Bloom "the finger." When Bloom learned of this, she went to plaintiff's supervisor, Franze. (D.I. 42 at B-261-284) Franze required both parties and all witnesses to submit incident reports. Bloom submitted a report describing the incident in detail and concluding, "[a]lthough this incident took place, [plaintiff] reported to my office at approximately 3:30 pm on 9/25/97 and did apologize for her behavior. As far as I'm concerned, we've resolved our differences and all is forgiven." (D.I. 42 at B-272)

Plaintiff filed an incident report omitting the details of the event and only saying the she and Bloom had a disagreement that they resolved within twenty-four hours. (D.I. 42 at B-279) Franze was unsatisfied with plaintiff's report and asked her to prepare a report that included the details of the incident. Plaintiff's second report stated:

Pursuant to our conversation at approximately 03:00 p.m. on 09/30/97 please be advised that the incident on 09/24/97 has been resolved by both parties who on 09/25/[97] mutually expressed their apologies. Furthermore, on 09/26/97 both Officer Bloom and myself were field partners, and no animosity was present. As I informed you on 09/30/97, my attorney is out of the Country and I had requested that if my 09/29/97 incident report wasn't sufficient that this matter be continued so I may consult with my attorney.

Finally, I want to thank you for allowing Officer John Reid to be present today pursuant to the National Labor Relations Board v. Weingarten 420 U.S. 251

(1975).

(D.I. 42 at B-281)

Franze was not satisfied with the second report. Franze ordered that plaintiff either submit a third report within one hour or face charges of insubordination. (D.I. 37 at A-86) After an hour, plaintiff saw Franze coming to plaintiff's office. Plaintiff told Franze that plaintiff's lawyer was out of town and that she wanted a union representative. Plaintiff then claims she went toward her office door and Franze prevented her from leaving. (D.I. 37 at A-86-87) Franze admits that she put her hand on the door, but she did it to keep the door from hitting her. (D.I. 37 at A-89) Eventually, plaintiff submitted the third report detailing the incident, and she received a written reprimand for the incident with Bloom. (D.I. 37 at A-104)

11. Second EEOC Filing

On November 24, 1997, plaintiff filed a second charge with the EEOC. The second filing alleged a series of retaliatory measures on the part of the DOC. The retaliatory measures included, among other things, allegations about Tom Mosley's behavior. On March 19, 1997, Mosley allegedly walked toward plaintiff with "determination," forcing her to brush up against the wall to avoid a collision. On April 16, 1997, Mosley "scanned [plaintiff] up and down and gave [her] a look of sheer anger." In June 1997, "Tom Mosley passed me in the middle

hallway, and started 'whistling Dixie.'" The EEOC filing also documents the time sheets incident, problems concerning the location of her promotional application, the Art Gauani incident, the Gina Bloom incident, and various other disagreements with Franze. The filing lists the physical symptoms of her stress such as headaches and chest pains. It also lists some of the facts surrounding her weapons history and psychological exams, which are discussed below.

12. Seizing of Audiotapes

Another example of hostile behavior in plaintiff's complaint is "having personal property, namely audiotape recordings, confiscated from [plaintiff's] office." (D.I. 1, ¶ 17) During an EEOC hearing on January 8, 1998, plaintiff told investigators that she had secretly taped several of her encounters with DOC and other officials. Deputy Attorney General Scott Shannon was present at the meeting and ordered that plaintiff's office be searched for the audiotapes. Franze searched plaintiff's office and seized nine tapes. (D.I. 42 at B-104, 138; D.I. 43 at B-435) The tapes were later returned to plaintiff. (D.I. 36 at 10; D.I. 46 at 43)

C. Plaintiff's Weapons History

Plaintiff voluntarily surrendered her weapon to the DOC on or about April 1, 1997. In a memo to Franze, plaintiff stated that she was "quite confident that I do not need a firearm to do

my job [and] with the summer approaching, I do not wish to have the inconvenience of wearing extra clothing in order to conceal." (D.I. 43 at B-501) On July 3, 1997, plaintiff wrote to Franze requesting her firearm back with a plan to carry it in a fanny pack. (D.I. 43 at B-502) Plaintiff never followed up on this request. (D.I. 43 at B-509) Although plaintiff had turned her weapon in, the DOC did not revoke her authorization to carry a firearm, which is known as a "green card." (D.I. 42 at B-85A)

D. Plaintiff's Psychological Examination and Subsequent Demotion

1. Psychological Examinations

According to a psychological evaluation done on behalf of the DOC, plaintiff starting seeing a psychologist when she was fifteen years old. In 1988, plaintiff began seeing a psychologist in New Jersey who recommended her to Dr. Kenneth J. Rubin. Plaintiff saw Dr. Rubin from 1988 to 1992 and then sometime later returned to him. (D.I. 37 at A-166-67)

Dr. Rubin approved plaintiff's return to work after each of her two stress leaves. On September 26, 1997,² Dr. Rubin wrote a letter for plaintiff asking that she be transferred. The note stated:

I am the treating psychiatrist for Cindy Scala. It is my professional judgment that a move to a less stressful unit, i.e., the intake unit or the community service unit would be beneficial to her mental health.

²This date falls in the middle of the Gina Bloom incident.

Any consideration would be appreciated.

(D.I. 42 at B-198)

Four days prior to Dr. Rubin's request that plaintiff be transferred to a less stressful unit, Alan Machtinger, the DOC's Director of Human Resources and Development, ordered a psychological evaluation of plaintiff "to determine if she can safely perform the duties of a Probation and Parole Officer . . . and [whether she] can safely be issued a firearm." (D.I. 37 at A-152) Machtinger made this request to Dr. Peggy Hullinger and based it upon plaintiff's two stress leaves within the past four months and most of the above outlined incidents. (D.I. 37 at A-152-53) Dr. Hullinger met with plaintiff on October 6, 1997. Dr. Hullinger performed a series of psychological tests and interviewed plaintiff. Dr. Hullinger issued a report which concluded:

Results of the psychological evaluation and testing indicate a woman who is chronically and intensely angry. She has exhibited hostile and aggressive impulses, poorly controlled anger and hostility. These episodes are episodic and cyclic in fashion. She is hypersensitive to rejection and easily becomes hostile when criticized. She lacks insight and understanding about the sources and consequences of her own feelings and behaviors. As a result, she tends to be extrapunitive and displaces blame unto others for her problems and difficulties. These characteristics are chronic and reflect a long standing personality disorder.

* * *

PO Scala is a high risk for carrying a weapon.

(D.I. 37 at A-168-69)³

2. Plaintiff's Transfer, Demotion, and Resignation

The DOC decided to demote plaintiff. That decision was made by Machtinger, Bureau Chief Noreen Renard, and the Director of Probation and Parole, Joseph Paesani. (D.I. 42 at B-84) Paesani testified in a deposition that he agreed with the decision to demote plaintiff based on the Hullinger report even though he had not read the report. Paesani's decision was based on Machtinger's characterization of the report. (Id. at B-84-85)

On December 9, 1997, plaintiff had a meeting with Machtinger, Renard, and union representatives Pat Cronin and John Reed.⁴ Machtinger and Renard told plaintiff that based on Hullinger's report, plaintiff could no longer be a probation officer. Machtinger told plaintiff, "[w]e are here at this time to offer you a social services specialist position. We are prepared to make a request to state personnel for retention of salary which they can approve or deny. But from a risk management standpoint, we will not allow you to stay in a probation officer position." (D.I. 43 at B-366) Plaintiff expressed to Machtinger and Renard that she thought the Hullinger

³Plaintiff's brief points to some factual inaccuracies in the Hullinger report. First, Hullinger's report states that plaintiff is a twin, when in fact, plaintiff has twin sisters. The report also states that plaintiff's father is dead, when in fact he is alive. (D.I. 37 at A-166; D.I. 43 at B-511)

⁴Plaintiff secretly recorded this meeting. A transcript can be found at D.I. 43 at B-364-72.

report was baseless and that there was no need for it in the first place. (Id.) After Machtinger told plaintiff the meeting was not intended to be adversarial, Renard explained that a social service therapist position fell within pay grade eight.⁵ (Id. at B-367) Machtinger noted that although they would request that plaintiff maintain her current salary, there may nevertheless be future financial impact. (Id.) Plaintiff asked what other options she had if the social service specialist position was "not an appealing move" for her. Machtinger responded, "One option is that it is possible to explore other agencies. But I will suggest to you that that does not tend to be a fruitful option. Ultimately the Department would consider discharge." (Id. at B-372) Renard suggested to plaintiff that if plaintiff were interested in other agencies, plaintiff should explore those on her own. Plaintiff responded that she would make a decision once Renard provided her with details about what she would be doing and in which office. (Id. at B-370)

On December 12, 1997, Dr. Rubin wrote a letter to the EEOC setting forth his disagreements with the Hullinger report. Dr. Rubin stated:

It is my impression while treating Ms. Scala over these years, that she has never been a risk to harm anyone or harm herself even though she can be suspicious and guarded towards her fellow employees. During all the contacts I've had with her over the years, I have never

⁵At the time, plaintiff's position as a probation and parole officer was a grade 11.

felt that she was a risk to anyone. I have never heard her describe herself to have the tendency to or though[t] to use her gun in an aggressive way and it is my belief that she has never used it. If I believed she posed a threat in the past, I would have advised her of same and insisted that she hand in her weapon.

(D.I. 42 at B-196) Dr. Rubin said he reviewed Dr. Hullinger's report and disagreed with the conclusion that plaintiff could not perform the functions of a probation officer and carry a gun.

(Id. at B-197) Dr. Rubin also clarified his earlier letter in which he asked that plaintiff be transferred to a less stressful unit.

[I]n reference to my letter of September 26, 1997, regarding changing Ms. Scala to [a] less stressful environment at work, the intent was to allow her to separate from her present supervisor who was causing her stress, to a unit with a different supervisor which would be less stressful.

(Id.) Plaintiff claims she personally placed a copy of this letter in Machtinger's hands on December 16 or 17. (D.I. 43 at B-514)⁶

On December 19, 1997, plaintiff was transferred to the Intake Unit at the Dover DOC facility under the supervision of Francisco Rodriguez. (D.I. 43 at B-434, 514) During his deposition, Rodriguez described plaintiff's duties and her performance of those duties.

⁶Paesani testified that although he did not become aware of Dr. Rubin's letter until the summer of 1998, he would have liked to have known about it prior to the decision to demote her, and it may have influenced his decision to demote plaintiff. (D.I. 42 at B-89)

Q: Do you want to describe what sorts of PO duties [plaintiff] was performing?

A: At the time she was basically helping with everything in the unit, assisting - providing coverage for institutional release. Basically a little bit of everything related to the functions of a probation officer.

* * *

Q: Okay. How would you characterize her performance of the PO duties that she did?

A: Never had any problems. It was perfect, her work quality was perfect. No problems.

Q: Was there ever an indication that she had a run-in with an offender?

A: Problems with offenders? No.

Q: You were satisfied with her performance of those duties?

A: Yes. She knew the job well. And she was a probation officer and - before she came to my unit she worked as a probation officer before, so there was no problems with her work.

Q: How would you characterize her violation of parole report writing?

A: Her reports were excellent. There was no problem. Wrote very well.

(D.I. 42 at B-9) Rodriguez further testified that plaintiff came to work for him as a probation officer II and continued to do that work for him as a probation officer II. Rodriguez was unaware why plaintiff had transferred to his unit or whether she had any limitations on her performance. (Id. at B-10)

In a February 10, 1998 e-mail, Machtinger formally offered plaintiff a social service specialist position at the New Castle Probation and Parole Office. If she agreed to the request, Machtinger would submit a request for a retention of salary.

(D.I. 37 at A-198) Between February 13, 1998 and March 2, 1998, Machtinger and plaintiff's attorneys traded four letters concerning Machtinger's offer to plaintiff. (D.I. 37 at A-200-

06) Plaintiff's lawyers first informed Machtinger that plaintiff would not agree to a voluntary demotion to social service specialist in light of the fact that her current supervisor was satisfied with her performance as a probation officer. (Id. at A-200) Machtinger agreed that plaintiff's new supervisor was satisfied with plaintiff's work; however, Machtinger noted that "she has been performing at the level of a Social Service Specialist II." (Id. at A-202) Machtinger put a new offer on the table. He gave plaintiff the choice of staying at the Dover Intake Unit where she currently was or transferring to the New Castle Office. Furthermore, instead of just requesting a retention of salary, Machtinger agreed to get prior approval of salary retention before effectuating the demotion. (Id.)

Plaintiff's lawyers rejected the offer. Plaintiff agreed to stay in the Intake Unit but rejected any demotion in her level. (Id. at A-204) The lawyers further disputed whether plaintiff was currently performing the duties of a social service specialist or a probation officer.⁷ Plaintiff believed that her

⁷The parties dispute whether plaintiff's duties in the Dover Intake Unit were those of a Social Service Specialist or a Probation Officer. On February 13, 1998, Regional Manager William Brandon wrote the following e-mail to Machtinger, explaining plaintiff's duties in the Dover Office.

The breakdown of SSS and PO duties at D02 Intake are:

SSS:
Cover FCKC intake
Cover SCKC/CPKC intake
Run Deljis/NCIC

transfer to the Intake Unit was a retaliatory action for her sexual harassment complaints and that the threat of a demotion was just further retaliation. (Id. at A-204-05)

On March 2, 1998, Machtinger informed plaintiff's lawyers that plaintiff would be demoted to Social Service Specialist II and her salary would be reduced from \$27,643 to \$26,261. (Id. at A-206) The demotion would be effective March 16, 1998, and she would continue to work in the Dover Intake Unit. (Id.)
Machtinger wrote:

While Ms. Scala has been performing satisfactorily in her current assignment, she is precluded from managing a caseload, making field visits and executing arrests, which are part of the responsibility of Probation and Parole Officers. In short, she has been working light duty in a paraprofessional capacity. According to Department policy, this light duty accommodation cannot be continued indefinitely.

(Id.)

Rodriguez assigned plaintiff different duties after her involuntary demotion to social service specialist. (D.I. 42 at B-11) Plaintiff filed a grievance regarding the demotion and

Assist with report writing
Process files
Research sentences

PO: As a PO, Cindy does all of the above SSS duties
PLUS the following PO duties.
Cover Institutional Release at DCC and MCI
Write VOP reports for intake
Cover VOP hearings in court
Assist with transport/arrests of offenders

(D.I. 43 at B-315)

proceeded through several steps of the grievance process. An alternative dispute resolution mediator suggested that plaintiff undergo another psychological examination. Plaintiff agreed to submit to another evaluation on the condition that the psychologist not have access to the prior psychological reports. The DOC did not agree to that condition because, according to Machtinger, the DOC relies on medical literature which calls for a psychologist to receive as much information as possible before performing an evaluation. (D.I. 37 at A-209)

On July 17, 1998, plaintiff submitted a resignation letter to Rodriguez effective August 14, 1998. (D.I. 37 at A-219) She continued to work the four weeks until her resignation became effective.

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person

could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). With respect to summary judgment in discrimination cases, the court's role is "'to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as

to whether the employer intentionally discriminated against the plaintiff.'" Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

IV. DISCUSSION

The DOC specifically seeks summary judgment on three issues. The DOC argues that (1) all matters occurring more than 300 days before plaintiff filed her claim with the EEOC may not be considered; (2) plaintiff was not subject to gender, retaliatory, or hostile work environment discrimination; and (3) the DOC did not violate the covenant of good faith and fair dealing.

A. Allegations Occurring More Than 300 Days Before her First EEOC Complaint

According to 42 U.S.C. § 2000e-5(e), a charge of employment discrimination must be filed within 300 days "after the alleged unlawful employment practice occurred." This filing requirement, however, "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). In West v. Philadelphia Electric Co., 45 F.3d 744 (3d Cir. 1995), the Third Circuit determined the continuing violation theory to be one such equitable exception to the timely filing requirement. See id. at 754. Under this theory, a "plaintiff may pursue a Title VII claim for discriminatory conduct that began prior to the filing

period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant." Id. To establish a continuing violation, a plaintiff must demonstrate (1) that at least one discriminatory act occurred within the filing period and (2) that the harassment is "'more than the occurrence of isolated or sporadic acts of intentional discrimination'" but is a "persistent, on-going pattern." Id. at 754-55 (quoting Jewett v. Int'l Tel. & Tel. Corp., 653 F.2d 89, 91 (3d Cir. 1981)); accord Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997). In determining whether a continuing violation exists, the court must consider:

- (i) subject matter - whether the violations constitute the same type of discrimination;
- (ii) frequency; and (iii) permanence - whether the nature of the violations would trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

West, 45 F.3d at 755 n.9 (adopting the approach taken by the Fifth Circuit in Berry v. Bd. of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir. 1983)); accord Rush, 113 F.3d at 481-82. "Once the plaintiff has alleged sufficient facts to support use of the continuing violation theory, however, the 300-day filing period becomes irrelevant--as long as at least one violation has occurred within that 300 days." West, 45 F.3d at 755.

As the Third Circuit in West noted, "[t]here is a natural

affinity between" hostile work environment and continuing violation claims. Id.

"In the arena of sexual [or racial] harassment, particularly that which is based on the existence of a hostile environment, it is reasonable to expect that violations are continuing in nature: a hostile environment results from acts of sexual [or racial] harassment which are pervasive and continue over time, whereas isolated or single incidents of harassment are insufficient to constitute a hostile environment. Accordingly, claims based on hostile environment sexual [or racial] harassment often straddle both sides of an artificial statutory cut-off date."

Id. (quoting Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 877 (D. Minn. 1993)) (alterations in original).

Plaintiff filed her first complaint with the EEOC on January 23, 1997. The DOC argues that no allegations concerning incidents occurring before March 30, 1996 should be considered in this suit. Plaintiff argues that all the incidents outlined above are actionable under the continuing violation theory. Plaintiff contends that the DOC was filled with "an atmosphere suggesting an institutional tolerance of gender-discriminatory behavior, thereby inducing in individuals such as Wester and Mosley a belief that they might safely act in a discriminatory manner.

Based on the facts asserted and the Third Circuit precedent,

all but the issue of plaintiff's starting salary⁸ shall be deemed part of plaintiff's case of discrimination under the continuing violation theory.

B. Discrimination Allegations

Claims brought pursuant to Title VII⁹ are analyzed under a burden-shifting framework. If plaintiff makes a prima facie showing of discrimination or retaliation, the burden shifts to defendant to establish a legitimate, nondiscriminatory reason for its actions. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If defendant carries this burden, the presumption of discrimination drops from the case, and plaintiff must "cast

⁸Not only is the issue of plaintiff's salary far removed temporally from even the next alleged instance of discrimination (June 1994 versus the Wester conduct in August 1995), but the salary issue is substantively different in character from the other allegations made by plaintiff at bar.

⁹The anti-discrimination provision of Title VII provides:

It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

sufficient doubt" upon defendant's proffered reasons to permit a reasonable factfinder to conclude that the reasons are fabricated. Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc).

1. Hostile Work Environment Claim

To state a Title VII claim premised on a hostile work environment, plaintiff must show: (1) that she suffered intentional discrimination because of gender; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same gender in that position; and (5) the existence of respondeat superior liability. See Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999).

In its brief in support of its motion for summary judgment, the DOC never addresses this issue.¹⁰ Accordingly, to the extent that plaintiff raises a hostile work environment claim, the court denies the DOC's motion for summary judgment.

2. Gender Discrimination Claim

In order to state a prima facie case of Title VII discrimination, plaintiff must show: (1) that she is a member of

¹⁰The phrase "hostile environment" appears only once in the DOC's brief. In its summary of argument section, the DOC states: "Plaintiff was not discriminated against because of her gender. She was not required to work in a hostile environment. Plaintiff was not retaliated against." (D.I. 36 at 19)

a protected class; (2) that she suffered some form of adverse employment action; and (3) that this action occurred under circumstances that give rise to an inference of unlawful discrimination such as might occur when a similarly situated person not of the protected class is treated differently. See Boykins v. Lucent Techs., Inc., 78 F. Supp.2d 402, 409 (E.D. Pa. 2000) (citing Jones v. Sch. Dist. of Phila., 198 F.3d 403, 410 (3d Cir. 1999)). The Third Circuit recognizes, however, that the elements of a prima facie case may vary depending on the facts and context of the particular situation. See Pivirotto v. Innovative Sys. Inc., 191 F.3d 344, 352 (3d Cir. 1999).

Once a plaintiff has established a prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. If the defendant carries this burden, the presumption of discrimination drops from the case, and the plaintiff must "cast sufficient doubt" upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are fabricated. Sheridan, 100 F.3d at 1072. See also Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 951-52 (3d Cir. 1996) (citations omitted) (stating that a plaintiff can demonstrate "sufficient doubt" by showing "weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action [such] that a reasonable factfinder could rationally

find them unworthy of credence").

Since it is undisputed that plaintiff is a member of a protected class, the first issue is whether plaintiff has suffered an adverse employment action. The Supreme Court has defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Of all the allegations made by plaintiff, only her transfer to the intake unit and demotion can be characterized as adverse employment actions. Although the court notes that it should analyze the DOC's acts collectively in determining whether they constitute an adverse employment action, see Shaner v. Synthes (USA), 204 F.3d 494, 503 n.9 (3d Cir. 2000); Lafate v. Chase Manhattan Bank, 123 F. Supp. 2d 773, 778 (D. Del. 2000), the sum of the remaining acts did not affect plaintiff's "compensation, terms, conditions, or privileges of employment." See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Thus, the court will focus solely on the transfer and demotion when evaluating her gender discrimination claim.

The next step in the gender discrimination analysis requires plaintiff to show that the adverse employment action occurred under circumstances that give rise to an inference of unlawful

discrimination such as might occur when a similarly situated person not of the protected class is treated differently. Plaintiff never argues that her transfer to the intake unit or her demotion were based upon her gender. Rather, she describes these acts as examples of retaliatory discrimination. Since plaintiff cannot link an adverse employment action to an incident motivated by gender discrimination, she has failed to establish a prima facie case of gender discrimination. Therefore, the court grants defendant's motion to the extent that plaintiff alleges discrimination based on her gender.¹¹

3. Retaliation Claim¹²

¹¹The only evidence proffered that refers to different treatment between men and women is the way the DOC handled the Gina Bloom incident versus the Tom Mosley incident. When Scala complained about a man exposing himself, the DOC conducted little or no investigation. When Gina Bloom complained that plaintiff fingered her, the DOC, through Franze, demanded multiple incident reports and ultimately reprimanded plaintiff for filing her report late. Although plaintiff arguably points to a difference between the treatment of men and women, plaintiff suffered no adverse employment action as a result of the Gina Bloom incident. See Robinson, 120 F.3d at 1301 ("reprimands and unnecessary derogatory comments . . . do not rise to the level of adverse employment action"). Furthermore, the fact that plaintiff did not report the Mosley incident and specifically asked that it not be pursued makes her claim less tenable.

¹²The anti-retaliation section of Title VII provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

Claims of retaliation brought pursuant to Title VII are analyzed under the same McDonnell-Douglas burden-shifting framework described above. As with a discrimination claim, a plaintiff claiming retaliation must first establish a prima facie case for retaliation under Title VII. In order to do so, a plaintiff must demonstrate by a preponderance of the evidence: (1) that she engaged in protected activity;¹³ (2) that the defendant took adverse employment action against her; and (3) that a causal link exists between the protected activity and the adverse action. See Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1999). Once a plaintiff has established a prima facie case, the burden shifts to the defendant to "clearly set forth through the introduction of admissible evidence" reasons for its actions that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the motivating force behind the adverse employment action. Burdine, 450 U.S. at 254-55. If the defendant successfully rebuts the plaintiff's prima facie showing, the presumption of discrimination drops from the case, and plaintiff must present sufficient evidence for a reasonable factfinder to conclude "that the proffered reason was not the true reason for the employment

¹³Title VII defines a "protected activity" as an instance when an employee has "opposed any practice made an unlawful employment practice by this subchapter, or . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

decision." Id. at 256. See also Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997) ("The plaintiff must produce evidence from which a reasonable factfinder could conclude either that the defendant's proffered justifications are not worthy of credence or that the true reason for the employer's act was discrimination.").

In the instant action, plaintiff has sufficiently raised a retaliation claim. Plaintiff engaged in several protected activities including filing two EEOC complaints and participating in an internal investigation into sexual harassment within the DOC. The DOC took an adverse employment action against plaintiff by transferring and demoting her. Plaintiff has sufficiently shown that a causal link exists between the protected activity and the adverse action.

The remaining analysis is similar to that of Title VII gender discrimination as stated above. Whether the justifications for plaintiff's demotion are worthy of credence is a question for the jury. Therefore, defendant's motion for summary judgment on the Title VII retaliation claim is denied.

C. Plaintiff's Claims for Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff alleges that the DOC's actions constitute a violation of the covenant of good faith and fair dealing "implicit in every employment contract." In this case, there is no employment contract between plaintiff and the DOC. Plaintiff

contends that "[t]he DOC, acting through Alan Machtinger, has engaged in active deception with regard to [plaintiff's] employment relationship. . . . Machtinger's (and the DOC's) active deception constitutes misrepresentation actionable under the Covenant of Good Faith and Fair Dealing." (D.I. 46 at 90)

The Delaware Supreme Court has recognized a narrow exception to the employment at-will doctrine created by the implied covenant of good faith and fair dealing. See E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436 (Del. 1996); Merrill v. Crothall-American, Inc., 606 A.2d 96 (Del. 1992). Specifically, the Delaware Supreme Court has limited the covenant to the following categories, where:

(1) the termination violated public policy; (2) the employer misrepresented an important fact and the employee relied "thereon either to accept a new position or remain in a present one"; (3) the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation related to the employee's past service; or (4) the employer falsified or manipulated a record to create fictitious grounds to terminate the employee.

Fini v. Remington Arms Co., Inc., No. Civ. A. 97-012-SLR, 1999 U.S. Dist. LEXIS 15864 at *10-11, (D. Del. Sept. 24, 1999) (quoting Pressman, 679 A.2d at 442-44). These limitations, however, are not "to be construed as limiting an employer's freedom to terminate an at-will employment contract for its own legitimate business, or even highly subjective, reasons." Merrill, 606 A.2d at 103; accord Pressman, 679 A.2d at 441.

Thus, in order

to constitute a breach of the implied covenant of good faith, the conduct of the employer must constitute "an aspect of fraud, deceit or misrepresentation." . . . The lodestar here is candor.

Merrill, 606 A.2d at 101 (citations omitted).

In order to succeed on her claim for breach of the covenant under the facts of this case, plaintiff must demonstrate either that the DOC misrepresented an important fact and she relied thereon to remain in her present position or that she was terminated in violation of public policy. The DOC notes that the DOC never terminated plaintiff, it only demoted plaintiff. Plaintiff argues that she was constructively discharged.¹⁴ Because the Delaware Supreme Court has limited the application of the covenant to terminations, see Lafate v. Chase Manhattan Bank, No 96-575-JJF at 21-23 (D. Del July 14, 1999)(unpublished), her claim fails.

V. CONCLUSION

¹⁴The DOC argues that plaintiff was not constructively discharged, pointing to the fact that, at the time of her resignation, she was happy with her supervisor, her job, and her co-workers. Moreover, when she submitted her resignation, she remained on the job for four additional weeks. Constructive discharge is found where an employer knowingly permits "conditions of discrimination in employment so unpleasant or difficult that a reasonable person would have felt compelled to resign." Connors v. Chrysler Fin. Corp., 160 F.3d 971, 974 (3d Cir. 1998). At this stage of the proceedings, there is no record evidence that plaintiff's last position involved conditions of employment "so unpleasant or difficult that a reasonable person would have felt compelled to resign."

For the foregoing reasons, defendant's motion for summary judgment is granted in part and denied in part. To the extent that plaintiff alleges a hostile work environment claim or retaliation claim, the motion is denied. To the extent that plaintiff alleges a gender based discrimination claim or a breach of the covenant of good faith and fair dealing, the motion is granted. The court does not address the defendant's contention that no reasonable juror could find severe emotional damage in this case attributable to the defendant because the issue of emotional damages is fact intensive and not conducive to summary judgment. An appropriate order shall issue.